No. 83-2002

IN THE

Supreme Court of the United States

October Term, 1983

JOSEPH M. HOUGHTON,

Petitioner,

vs.

PRUDENTIAL PROPERTY & CASUALTY INSURANCE COMPANY, KEYSTONE INSURANCE COMPANY, BENJAMIN E. ZUCKERMAN, ESQUIRE and DEAN B. STEWART, JR., ESQUIRE,

Respondents.

RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

H. ROBERT FIEBACH
HENRY L. SHRAGER
WOLF, BLOCK, SCHORR
AND SOLIS-COHEN
Twelfth Floor Packard Building
Philadelphia, PA 19102

Attorneys for Respondent, Benjamin E. Zuckerman, Esquire

HUGH J. HUTCHISON
OBERMAYER, REBMANN, MAXWELL & HIPPEL
14th Floor Packard Building
Philadelphia, PA 19102

Attorneys for Respondents, Keystone Insurance Company and Dean B. Stewart, Esquire

JAMES C. BOWEN
ANITA F. ALBERTS
POWER, BOWEN & VALIMONT
102 North Main Street
Doylestown, PA 18901

Attorneys for Respondent, Prudential Property & Casualty Insurance Company

Batavia Times Publishing Co.
Edward W. Shannon
Philadelphia, Pa. (215) 232-8181

Counterstatement of Question Presented

Whether the mere allegation of the abuse or misuse of the state subpoena process by private litigants and their attorneys, without also claiming either that these litigants and attorneys acted in concert with state officials, that there existed a practice of private enlistment of state officials to accomplish impermissible ends or that the state statute authorizing the subpoena power is unconstitutional either on its face or as applied, sufficiently implicates state action so as to invoke federal jurisdiction under 42 U.S.C. §1983 and thereby survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

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Opinions Below

The judgment of the Court of Appeals, affirming the decision and order of the District Court, is found in Petitioner's appendix at pages A-1 through A-4.

The opinion of the District Court is found in Petitioner's appendix at pages A-5 through A-6.

Counterstatement of the Case

A. Procedural History

On June 7, 1982, Petitioner, Joseph M. Houghton, filed suit in the Court of Common Pleas of Montgomery County, Pennsylvania, captioned *Joseph Houghton v. Prudential Property & Casualty Insurance Co., Keystone Insurance Co., Avis Insurance Co., Temple Insurance Co., Benjamin E. Zuckerman, Esquire, Dean B. Stewart, Jr., Esquire, James C. O'Connor, Esquire and Robert M. Ruzzi, Esquire*, C.A. #82-7891, asserting various invasion of privacy counts against these insurance carriers and their counsel for subpoenaing and disseminating certain of his medical records which were claimed to be confidential and highly sensitive in nature. That state court action is presently pending.

Subsequently, on March 16, 1983, Houghton filed a Complaint in the United States District Court for the Eastern District of Pennsylvania, which is the subject of this Petition for a Writ of Certiorari. The Complaint, directed against two of the insurance carriers and their respective attorneys named in the state court action, is based upon the same facts set forth in that prior lawsuit but seeks relief under 42 U.S.C. §1983 for allegedly depriving Houghton of his federal constitutional rights.

Defendants filed motions to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, citing, among other grounds, that the Complaint failed to state a cognizable cause of action under 42 U.S.C. §1983. By Order dated May 31, 1983, the Honorable Charles R. Weiner granted the motions to dismiss. On appeal, the Honorable Arlin M. Adams, writing for a unanimous three judge panel of the Court of Appeals for the Third Circuit, affirmed the judgment of the District Court in a memorandum opinion issued March 14, 1984. This Petition for a Writ of Certiorari followed.

B. Factual Background

For purposes of this brief, Respondents adopt the statement of facts set forth in the opinion of the Third Circuit which appears at pages A-1 through A-4 of the Appendix in the Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

A. The Opinion Of The United States Court Of Appeals For The Third Circuit Was Eminently Correct Since Petitioner Fails To State A Claim Cognizable Under 42 U.S.C. §1983.

Because the Fourteenth Amendment of the Constitution is directed at the states, it can only be violated by conduct that may be fairly characterized as "state action" rather than acts of private persons or entities. *Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764 (1982). Thus, 42 U.S.C. §1983 provides a remedy for the deprivation of rights secured by the constitution and laws of the United States when that deprivation takes place under color of any statute, ordinance, regulation, custom or usage of any state or territory. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 102 S.Ct. 2744 (1982).

The Third Circuit affirmed the judgment of the District Court holding that Petitioner had failed to establish that the private action of the attorneys or the insurance companies was "fairly attributable" to the state under the two-pronged test articulated by this Court in *Lugar*:

> First, the deprivation must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible . . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state. Without a limit such as this, private parties

> could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.

102 S.Ct. at 2754.

Petitioner argues that because the use of the state subpoena power constitutes the exercise of a rule or privilege created by the state, the lower courts erred in denying a cause of action under §1983 for the alleged deprivation of his constitutional rights through the improper use of such subpoenas. While the Third Circuit concluded and Respondents therefore concede that the use of the state subpoena power does satisfy the first prong of the *Lugar* test, Petitioner's argument goes no further in establishing the existence of state action.

The test for alleging a cognizable state action claim under §1983 includes a second step as well so as to limit causes of action to those areas clearly intended by Congress. Many of our daily activities are governed, either directly or indirectly, by the exercise of a right or privilege created by the state or by a rule of conduct imposed by the state. If each of these activities, without more, were to be a potential source of a §1983 civil rights claim, our courts would be flooded with constitutional litigation. As this Court observed in *Lugar*, "private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them." 102 S.Ct. at 2754.

This second prong of the two-tiered *Lugar* state action test embodies several disjunctive requirements, any one of which will satisfy the second test. Nevertheless, Petitioner has totally ignored this second step of the *Lugar* test, thereby rendering his claim fatally defective. Petitioner has never alleged either in the Courts below or before this Court that the attorneys or the insurance

companies either acted in concert with or in conspiracy with state officials or that there was in existence at the time the subpoenas were obtained a pattern or practice of private enlistment of state officials to accomplish impermissible ends. Rather, Petitioner's sole contention is that the mere alleged abuse or misuse of the subpoenas by the private attorneys or their clients constituted state action. However, an allegation of improper use of state procedures by private actors alone is insufficient to plead a civil rights claim under §1983. *Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777 (1982); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 98 S.Ct. 1729 (1982).

Having failed to even discuss much less meet either of these requisite elements of the second part of the *Lugar* test, alternatively, Petitioner must challenge the constitutionality of the state statute or procedure authorizing the subpoena power to invoke federal jurisdiction under §1983. *Lugar*, 102 S.Ct. at 2757. Petitioner readily admits that he failed to do so.[1] Further, he even concedes that there is no basis upon which to invoke such a challenge to the procedure for obtaining pre-trial discovery subpoenas.

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[1] Petitioner incorrectly suggests that *Juidice v. Vail*, 430 U.S. 327, 97 S.Ct. 1211 (1977) would prohibit such a constitutional challenge in the federal court to the state's legitimate exercise of its subpoena and contempt powers. On the contrary, *Juidice* is consistent with *Lugar* and the Third Circuit's decision below. *Juidice*, a federal abstention case held that litigants "... need be accorded only an opportunity to fairly pursue their constitutional claims in the ongoing state proceedings, *Gibson v. Berryhill*, 411 U.S. 564, 577, 93 S.Ct. 1689, 1697 (1973), and their failure to avail themselves of such opportunities does not mean that the state procedures were inadequate". 97 S.Ct. at 1218. The exception to this abstention doctrine occurs when it is alleged and proved that the state is enforcing the contempt procedures in bad faith or is motivated by a desire to harass. Since Petitioner did not assert such a claim, the District Court properly abstained from assuming jurisdiction under the doctrines of federalism and comity enunciated in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746 (1971) and *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200 (1975), *reh'g denied*, 421 U.S. 971, 95 S.Ct. 1969 (1975).

> It is not the obtaining of these subpoenas that demands this Court's judicial intervention, but the misuse of those subpoenas once obtained, to violate a citizen's constitutionally protected rights that requires this Court's judicial guidance. (Petition for Writ of Certiorari, page 8).

The conduct of which Petitioner complains cannot be ascribed to any governmental decision. Therefore, by limiting his claim in the Complaint, the appeal before the Third Circuit and this Petition for Certiorari to only the alleged misuse of the subpoenas, without an allegation of joint participation by a state actor, and further, without a constitutional challenge to the relevant state procedure, Petitioner has failed to state a claim sufficient to invoke federal jurisdiction under §1983. *Lugar v. Edmondson Oil Co., Inc., supra.*

The issue presented by Petitioner required nothing more than the routine application of this Court's mandate in *Lugar*, which was correctly analyzed and decided by the Third Circuit in affirming the judgment of the District Court.

B. The Decision Of The Third Circuit Does Not Conflict With The Decisions Of This Court Or Any Other Courts Of Appeals.

Most significantly, Petitioner does not contend that the Third Circuit deviated from this Court's state action standard set forth in *Lugar.* In fact, Petitioner curiously avoids any discussion whatsoever of the second part of the two-pronged *Lugar* test. Rather, Petitioner cites *United States v. Wiseman*, 445 F.2d 792 (2nd Cir. 1971), *cert. denied*, 404 U.S. 967, 92 S.Ct. 346 (1971) as his sole support for the proposition that under the "public function theory" the use of a pre-trial discovery subpoena by a private litigant constitutes state action for purposes of a §1983 claim.

The public function theory is not a separate and independent state action test to be applied to the exclusion of the mandate by this Court. Rather, it is applied in conjunction with the *Lugar* analysis, thereby requiring either a claim that a state actor participated in the alleged misconduct, or a constitutional challenge to the state's procedural rules. *Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764 (1982); *Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777 (1982). By ignoring this analysis, Petitioner refuses to recognize the development of the law and the decisions of this Court since *Wiseman, supra*, was decided thirteen years ago.[2]

Additionally, those courts of appeals which have considered post-*Lugar* §1983 claims have uniformly rejected those cases which attack only the actions by private parties under a valid state statute rather than the constitutionality of a prohibitory one. *See, Higbee v. Starr*, 698 F.2d 945 (8th Cir. 1983); *Earnest v. Lowentritt*, 690 F.2d 1198 (5th Cir. 1982). Most recently, in *Barnard v. Young*, 720 F.2d 1188 (10th Cir. 1983), a case strikingly similar factually to the instant case, the United States Court of Appeals for the Tenth Circuit, applying *Lugar*, specifically held that the conduct of a private attorney who employed the subpoena *duces tecum* power of the State of Oklahoma to obtain an opposing party's medical records could not be chargeable to the state under 42 U.S.C. §1983.

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[2] Petitioner cites *Timson v. Weiner*, 395 F.Supp. 1344 (S.D. Ohio, E.D. 1975), another pre-*Lugar* decision, in support of the *Wiseman* "public function theory" rationale. For the reasons stated above, its precedential value is seriously undermined. Moreover, *Timson* has never been adopted within its own circuit by the United States Court of Appeals for the Sixth Circuit.

Nor is Petitioner correct in stating that the Second Circuit espouses a conflicting position. *Wiseman* considerably predates *Lugar* and its progeny. Therefore, at the time of its decision, the Second Circuit was not bound by the *Lugar* mandate, which controls the issue presented here. Moreover, not only does *Lugar* and its progeny implicitly overrule *Wiseman* for the proposition cited by Petitioner but, since the *Wiseman* decision, the Second Circuit has neither applied that holding to decide a subsequent §1983 claim nor has it had an opportunity to decide a similar question post-*Lugar*. However, in *International Society for Krishna Consciousness, Inc. v. Air Canada, et al.*, 727 F.2d 253 (2nd Cir. 1984) (decided on other grounds), the Second Circuit has specifically recognized "... the complex of criteria elucidated and elaborated in the array of cases including *Lugar v. Edmondson Oil Co.*, ...", 727 F.2d at 254, which must be considered in resolving allegations of state action under §1983. Accordingly, because the Second Circuit has not reached a dispositive post-*Lugar* decision on the issue presented by Petitioner which rejects or refuses to apply the analysis mandated by this Court, there is in fact no conflict to be resolved.

Moreover, upon careful scrutiny, none of the other cases cited by Petitioner (all of which pre-date *Lugar* as well) expressly adopts the *Wiseman* holding. *Wilkins v. Rogers*, 581 F.2d 399 (4th Cir. 1978), actually questions the holding of the case stating only that process servers "may" commit state action in carrying out their duties. *Wilkins*, 581 F.2d at 405. The other cases cited by Petitioner also fail to follow *Wiseman: Taylor v. Consolidated Edison Co. of New York, Inc.*, 552 F.2d 39 (2nd Cir. 1977), *cert. denied*, 434 U.S. 845, 98 S.Ct. 147 (1977) (*Wiseman* applies only where the process server acts arbitrarily); *Ruffler v. Phelps Memorial Hospital*, 453 F.Supp. 1062 (S.D.N.Y. 1978), identifies *Wiseman* as

a case cited for the proposition that the public function theory has been "recognized and discussed"); *Carrasco v. Klein*, 381 F.Supp. 782 (E.D.N.Y. 1974) (implies that *Wiseman* might say that "sewer service" could be regarded as a public function); *Isaacs v. Board of Trustees of Temple University, et al.*, 385 F.Supp. 473 (E.D. Pa. 1974), (cites *Wiseman* for the proposition that Courts have found state action in a broad spectrum of factual situations).

Since Petitioner has failed to demonstrate the existence of any conflict within the circuits, a necessary ingredient on which Petitioner relies for granting the Petition is wanting.

C. The Issues Raised By Petitioner Are Not Sufficiently Important To Warrant Review By This Court.

Petitioner has failed to demonstrate any special or important reasons for this Court's review of the judgment below. The dismissal of the Complaint was fully consistent with the relevant decisions of this Court as well as the application of those principles by other circuit courts of appeals, and did not involve any unsettled question of federal law.

Moreover, the state court affords appropriate remedies to prevent either the potential invasion of privacy rights during pre-trial discovery, *i.e.*, a motion to quash the subpoena, or alternatively, provides the mechanism for redress after the alleged abuse has occurred by instituting suit in the state court for the invasion of privacy, as this Petitioner has already done. Therefore, no useful purpose would be served by further review of the judgment entered below since an appropriate forum is available to resolve the identical pending claim.

D. The Result Urged By Petitioner Would Improperly And Unnecessarily Expand Federal Court Jurisdiction.

Finally, extending petitioner's argument to its logical conclusion would create chaos in the federal court system. Permitting parties to invoke federal jurisdiction whenever a private litigant in a state court allegedly uses the state court process improperly either in the commencement of suit, or during suit in the discovery process, as is alleged here, or in any other activity prescribed under state statute or procedure, without either obtaining the aid of a state official or challenging its constitutionality, would open the floodgates to duplicitous and harassing litigation. Such a departure from the existing law would improperly and unnecessarily expand federal court jurisdiction to areas where Congress never intended it to exist. Accordingly, there is simply no need for a re-examination of the issue by this Court.

Conclusion

For all of the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

H. ROBERT FIEBACH
HENRY L. SHRAGER
WOLF, BLOCK, SCHORR and
SOLIS-COHEN
Twelfth Floor, Packard Building
Philadelphia, Pennsylvania 19102
Attorneys for Respondent,
Benjamin E. Zuckerman, Esquire

HUGH J. HUTCHISON
OBERMAYER, REBMANN, MAXWELL
& HIPPEL
14th Floor Packard Building
Philadelphia, Pennsylvania 19102
Attorneys for Respondents,
*Keystone Insurance Company**
and Dean B. Stewart, Esquire

JAMES C. BOWEN
ANITA F. ALBERTS
POWER, BOWEN & VALIMONT
102 North Main Street
Doylestown, Pennsylvania 18901
Attorneys for Respondent,
Prudential Property & Casualty
*Insurance Company***

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